No other contract was ever entered into between the parties. It was there held that there was no final agreement of which specific performance could be enforced against the Defendant.

Similarly in the case of *Von Hatzfeldt-Wildenburg* v. *Alexander*[8], it was held that "it is a question of construction whether the execution of a further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

The affidavits of the Applicant show, so it seems to me, that the Applicant has put himself into a situation quite inconsistent with his assertion on the one hand that there was a contract, and on the other which is directly in conflict with his assertion, the general allegations of fraud, mistake, misrepresentation and illegality.

Having considered the matter carefully, and upon the authorities, I am of the opinion that the Respondents are entitled to an order in terms of their prayers in the Notice of Motion, and I order that the caveat entered by the Applicant be removed with costs to the Respondents.

Order accordingly.

Solicitors: *Mah-Kok & Din; Syarikat K.S. Tan*

S. THAIYALNAYAGAM v. G.M. KODAGUDA

[O.C.J. (Wan Hamzah J.) March 26, 1982]
[Kuala Lumpur – Originating Summons No. F 357 of 1980]

Family Law – Custody – Parents of children deceased – Claim by grandmothers of children – Welfare of infants – Wishes of infants – Religion of parties – Guardianship of Infants Act, 1961

In this case the father of the children had died in a car accident and their mother had been murdered. The maternal grandmother applied for an order of adoption of the children and an interim order was made for her to have custody of the children for six months. The paternal grandmother applied to intervene in the adoption proceedings and obtained an order for access. She subsequently brought an application for custody of the children to be given to her. Both the adoption application and the custody application were heard together. The learned Judge dismissed the application for adoption and considered the question of custody. He interviewed the children, who expressed a wish to live with the maternal grandmother.

Held: (1) in this case both the grandmothers can give love and affection to the children and they are well off financially so as to be able to provide for maintenance for the children and their education. The children would however be happier to live and be looked after by the maternal grandmother for the reasons given by them;

(2) on the facts the home of the maternal grandmother would be more conducive to their welfare than the house of the paternal grandmother;

(3) there was no evidence that it was the wish, of the children's parents that they be guided in the Hindu religion. The evidence was that the mother was a Roman Catholic and had undertaken to bring up the children in the Roman Catholic faith;

(4) in the circumstances the maternal grandmother should continue to have custody of the children.

ORIGINATING SUMMONS.

Miss C.H. Liew for the applicant.
Manjeet Singh for the respondent.

Cur. Adv. Vult.

Wan Hamzah J.: This is an application by S. Thaiyalnayagam d/o Sinnakutty (to whom I shall refer as Madam Thaiyalnayagam) for an order of custody of the following infants:–

(a) Danendra Sinnappa.
(b) Rohini Sinnappa.
(c) Malini Sinnappa.

These infants are the children of Sinnappa Sivapakiam and Jean Philomena Perera. Sinnappa Sivapakiam was the son of Madam Thaiyalnayagam, and he died in a car accident on January 1, 1978. Jean Philomena Perera was murdered on April 6, 1979 and she was the daughter of the Respondent, Gertrude Mabel Kodagoda alias Mabel Perera (to whom I shall refer as Madam Kodagoda). Therefore both Madam Thaiyalnayagam and Madam Kodagoda are grandmothers of the infants the subject matter of this application.

It would be useful to state briefly the history of the proceedings in the court relating to the infants. In May 1979 Madam Kodagoda filed an application for an order of adoption of the three infants, vide Adoption Application No. 4 of 1979. On May 18, 1979 Azmi J. made an interim order for Madam Kodagoda to have custody of the

infants for six months. On June 5, 1979 Madam Thaiyalnayagam applied to intervene in the adoption proceedings and on June 19, 1979 Abdul Hamid J. made an order in terms. On June 21, 1979 Madam Thaiyalnayagam as Intervener filed a notice of motion for the adoption proceedings to be struck off, that the interim order of May 18, 1979 be rescinded and that Madam Kodagoda should deliver the infants to her. On July 13, 1979 Madam Thaiyalnayagam as Intervener applied for an order of access to the infants while the adoption application was pending. On November 16, 1979 Madam Kodagoda by summons applied for extension of the interim order of custody dated May 18, 1979, and it was granted on December 11, 1979. On June 9, 1980 Madam Thaiyalnayagam filed this Originating Summons No. F357 of 1980 applying for an order that:

(1) the custody, care and control of the three infants be committed to her,

(2) she be appointed legal guardian of the infants,

(3) Madam Kodagoda should deliver the infants to her.

Both parties agree that the adoption application and this application for custody be heard together. Eventually they were heard together, and I interviewed the three infants. I decided to dismiss Madam Kodagoda's application for adoption, and I am left with the question of custody to dispose of. On the question of custody I have to consider the welfare of the infants as the first and paramount consideration, that is to say their welfare must be the overriding consideration and other considerations must be subordinate. The question to be determined is whether Madam Thaiyalnayagam should be given custody of the infants or whether Madam Kodagoda should continue to have the custody for which she had previously obtained an order of the court. Relating to Madam Kodagoda's application for adoption and Madam Thaiyalnayagam's application for custody the Social Welfare Officers have made investigations and submitted their reports in detail. From these reports and from the many affidavits filed by both parties I have been able to make findings of facts relevant to these matters.

Madam Kodagoda is a widow aged about 60 years. She has four children apart from Jean Philomena Perera, deceased. One of her daughters although already about 40 years of age is unmarried and unoccupied and is reported to be childish. Her elder son is an accounts manager for a company and is married to a working wife. The couple is earning a good income. Madam Kodagoda's third daughter is a qualified music teacher also earning a good income. Her younger son is pursuing a chartered accounting course in England and at the same time earning sufficient allowance to pay for his studies. Madam Kodagoda herself is also earning substantial income. She has two houses which she rents out and she runs a kindergarten class at her house and does work as a seamstress. She receives pension from the Widows and Orphans Fund. She has two girls living with her doing domestic work for the family. Medical reports obtained from Government doctors and produced in this court show that Madam Kodagoda is free from any serious illnesses and diseases and that she is fit and not on any medication.

Madam Thaiyalnayagam is a widow about 60 years of age. She has five children apart from Sinnappa Sivapakiam, deceased, the father of the infants. One daughter is a teacher and married, with three children. Another son is Karthegesu Sivapakiam, a bachelor and lecturer at the Specialist Teacher Training Institute drawing a good salary. He was convicted of the murder of his sister-in-law, Jean Philomena Perera, the mother of the infants, but his conviction was quashed on appeal to the Federal Court. Another son of Madam Thaiyalnayagam is Thuraiappa Sivapakiam, who is about 35 years of age, single, a spastic, born handicapped, and has never been to school. Her fourth son is Kugarajah Sivapakiam who is about 32 years of age, an estate manager in Melaka, earning $2,875 per month. Her youngest daughter is Jaya Letchumy who is about 22 years of age, single, mentally retarded and unemployed.

Madam Thaiyalnayagam is unemployed. She receives regular money contributions from her working children. She draws pension monthly. She rents out one of her houses and lives in another. She has savings and a life insurance policy. She produced a medical certificate showing that she is in good health.

On December 1, 1982 I interviewed the three infants. All of them told me that they like to live with Madam Kodagoda and do not like to live with Madam Thaiyalnayagam. They expressed not only their feelings but also reasons for their feelings. Danendra said that Madam Kodagoda takes care of him better than Madam Thaiyalnayagam and he likes the former better than the latter. He seems to complain of lack of attention being paid to him at Madam Thaiyalnayagam's place

because the servant girl looks after her instead of him. Furthermore Danendra prefers to continue to go to school in Kajang where Madam Kodagoda lives. Like Danendra, Rohini also complains of lack of care and attention at Madam Thaialnayagam's place, although she likes her as she likes Madam Kodagoda. She seems to feel confident and safe with the attention which she gets from her maternal aunt at Madam Kodagoda's house. Malini's reason for preferring to live with Madam Kodagoda seems to be that she is impressed with the cleanliness and orderliness in Madam Kodagoda's house.

I am satisfied but both Madam Thaiyalnayagam and Madam Kodagoda can give love and affection to the children. I am also satisfied that both of them are well off financially so as to able to provide for maintenance for the infants and for their education. But I believe that the infants would be happier to live with and be looked after by Madam Kodagoda for the reasons given by the children themselves. I also find that there are other reasons why Madam Kodagoda's home is more conducive to their welfare than Madam Thaiyalnayagam's place. The fact of the children having to live together with a spastic uncle and a mentally retarded aunt at Madam Thaiyalnaygam's house would be a disadvantage to them. On the other hand, living in Madam Kodagoda's house where she runs a kindergarten class is an advantage to them in that they are exposed to learning from early age. They also have the added advantage of living with an aunt who is a qualified music teacher who can teach them music with the musical instrument available in Madam Kodagoda's house.

Madam Thaiyalnayagam claims that she should have custody of the infants because she can guide them in the Hindu religion. She claims that the infants' parents had practised the Hindu religion with them, that while living with her at Klang the infants had been going to the Hindu temple with her every Friday, that their mother also attended prayers at the temple when she was free. Madam Thaiyalnayagam produced an affidavit sworn by a priest of a Hindu temple in Klang. He conducted the 31st day ceremony for the late father of the infants. He stated that Danendra performed the rites that were required of him in the Hindu religion in the ceremony. He also stated that the infants attended and participated in the annual ceremony conducted for their deceased father. He confirmed that the infants attended the temple with Madam Thaiyalnayagam on Fridays. I do not think that any importance should be attached to the fact of the infants attending the temple and participating in the religious ceremonies there. Being very young they would go to any place if taken there by the elders and they would participate in any ceremony if asked to do so by the elders.

Madam Thaiyalnayagam also claims that it was the infants' parents' wish that the infants be guided in the Hindu religion. I am unable to make a finding that this was so. Just before Jean Philomena Perera got married to Sinnappa Sivapakiam both of them signed declarations, whereby Jean Philomena Perera promised to remain steadfast in her Catholic faith and to do all in her power to have all her children baptized and brought up in the Catholic faith. Sinnappa Sivapakiam declared that he understood the nature of the obligation of the promise made by Jean Philomena Perera, his future wife, as a member of the Catholic Church. These declarations show that it was the wish of both parents of the infants that the infants be brought up in the Catholic faith. It appears that they have not been baptized because it is not yet time for them to be baptized. If they had not made the declarations Jean Philomena Perera would not have been allowed by the Church to marry Sinnappa Sivapakiam.

Under the above circumstances I make an order that Madam Kodagoda should continue to have custody of the three children, and I dismiss Madam Thaiyalnayagam's application. In the past the parties have made their own arrangements for Madam Thaiyalnayagam's access to the children. I trust that they will continue to make their own arrangements. In case there would be some difficulty, I give liberty to the parties to apply to the court regarding access. I make no order as to costs.

Order accordingly.

Solicitors: *C.H. Liew & Co.; Manjeet Singh Dhilon & Co.*